In the Supreme Court of the United States

OCTOBER TERM, 1945

POPE & TALBOT, INC., a corporation,
Petitioner,

vs.

MATSON NAVIGATION COMPANY,
a corporation,
Respondent.

Brief in Support of Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the District Court is not officially reported. The opinion, however, is reported in full in 1943 American Maritime Cases, page 1006.

The opinion of the Circuit Court of Appeals has not yet been officially reported. It was filed on May 11, 1945, amended by an order of May 19, 1945, and appears in the Record at pages 839 to 854. The decree thereon was entered May 11, 1945.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is founded on Section 240 of the Judicial Code (28 U.S.C. Sec. 347) and Article III, Sec. 2, of the Constitution of the United States.

STATEMENT OF FACTS

The collision occurred at approximately 5:15 a. m. on November 2, 1941. At the time, it was dark. The Maui, a twin-screw vessel of 9,940 gross tons, 501 feet in length, and driven by turbine engines, was proceeding from Crockett to Hunters Point for dry docking (R. 135, 516). Proceeding at her half speed of about 12 knots, she sighted the lights of the tug Despatch No. 7, with the Barge No. 11 in tow, ahead of her and likewise proceeding in the general direction of the San Francisco-Oakland Bay Bridge (R. 522). The tug and tow, first seen to be crossing the Maui's course from port to starboard on a fine angle, shortly thereafter straightened up so as to be on a substantially parallel course. The Maui blew a two-blast whistle to the tug, indicating her intention to pass the tug on the latter's port hand (R. 522, 527). The Maui's course was then changed two to three degrees to the left (R. 527, 664), and she proceeded to attempt to overtake the tug and tow. No reply was heard to this whistle signal to the tug, but about a minute later a two-blast whistle signal was heard by the Maui from the tug, and her master said that he thought it was a reply to her signal (R. 576, 577). The Absaroka by this time was not in sight, as a view of her was shut out by Yerba Buena Island. This two-blast signal heard by the Maui was, in fact, blown by the tug to the Absaroka (R. 457, 458, 459). At this time, the

courses of the Maui and the tug were both toward the center of the span between Piers D and E of the San Francisco-Oakland Bay Bridge (R. 456, 527, 796). While still well astern of the tug she was attempting to overhaul, the Maui observed the lights (green, masthead and range) of the Absaroka bearing 2½ to 3½ points on the Maui's port bow (R. 528, 638, 797). The angle of approach to the course line of the Maui appeared to be about 60 degrees (R. 532, 638).

The Absaroka was a smaller cargo vessel, 430 feet long and having a tonnage of 5,695 gross tons. She was proceeding to sea (R. 135). She emerged from the Oakland creek or estuary about 5:02 a. m. and proceeded at a speed of nine knots or less (R. 225). On leaving the estuary, she shaped her course toward the span between Piers D and E of the San Francisco-Oakland Bay Bridge, keeping the green lights marking the center of the span a little open on her port bow (R. 226-7, 364-5). On this course, she passed 800 to 1,000 feet off the southerly shore of Yerba Buena Island where the lighthouse station is located (R. 184, 311). While some distance from the bridge, she picked up the colored and the towing lights of the Standard Oil Company's tug, Despatch No. 7 (R. 230).

The Maui was not then in sight, being hidden from her view by Yerba Buena Island. The tug blew two blasts of her whistle to the Absaroka, which indicated to the Absaroka that the tug intended to pass starboard to starboard (R. 230). The Absaroka accepted this proposal promptly by answering with two blasts (R. 230). The lights of the Despatch No. 7 then altered position so that only her green and white lights were visible on the Absaroka's starboard bow (R. 316).

A short time after making the passing agreement with the tug and tow, the red light and masthead and range lights of the Maui came into view to the Absaroka's right of the tug and bearing considerably broader (two or three points) on the Absaroka's starboard bow (R. 231, 276-277). The heading of the Maui could not immediately be made out (R. 308), but later she appeared to be altering her course somewhat to the left so that its projection would cross the course first of the Despatch No. 7 and then that of the Absaroka (R. 236).

The Absaroka and the Maui, when they sighted each other, were on what is known as the "crossing situation" under the Inland Rules, the Maui being what is familiarly called the privileged or hold-on vessel, and the Absaroka being the burdened or give-way vessel. This resulted from the fact that the vessels were on crossing courses, with the green light of the Absaroka opposed to the red light of the Maui, or, to put it in other terms, with the Maui on the starboard hand of the Absaroka.

When the Maui and Absaroka came into sight, the Maui sounded a blast which stuttered, and, fearing the Absaroka might think it a two-blast whistle, she blew a danger signal followed by one clear blast (R. 530, 541). The Absaroka answered the latter whistle immediately with one blast (R. 530). The two vessels were then 1½ to 2 miles apart (R. 540), the Maui proceeding at about 12 knots and the Absaroka at a speed of about 9 knots. The vessels, including the tug and tow which the Maui was attempting to overhaul, continued to approach each other for a period of from 2½ to 3 minutes. About 2¼ minutes before the collision, the Absaroka's bearing on the Maui's

port bow had broadened to about 4 points (R. 620, 647). At this time the master of the Maui believed he was *in extremis* and ordered his engines, which had previously been working at half speed and making 12 knots, to be put at full ahead (R. 534). He sounded one blast of the whistle, which the Absaroka answered with one (R. 534). He then went hard right on his rudder, and says that he put his starboard engine in reverse (R. 534). His deck bell book,[1] however (in conflict with the engine room bell book[2]), shows that he put his port engine in reverse. A danger signal followed by one blast was then blown by the Maui, the Absaroka answering the latter (R. 534-536, 541). The Maui then reversed both engines for a short time, following this by an order for full speed ahead on the starboard engine and a hard-left rudder (R. 534-536). The helmsman was not able to get the wheel over from hard right to hard left before the collision.

The Absaroka had stopped her engines within about a minute of sighting the Maui. She was slowing down as she passed Yerba Buena Island (R. 183).

A four-blast whistle followed by one from the Maui was heard, and the Absaroka answered the latter whistle (R. 235). The Absaroka then went full astern on her engines, hard right on her rudder (R. 319). As this maneuver was in violation of her agreed passing signal with the Despatch No. 7, she blew a four-blast danger signal to that vessel (R. 280). The tug had, however, already appreciated her own danger and had swung off her course at a right angle

1. Exhibit 4, R. 553; offered in evidence at R. 551.

2. Exhibit 1, R. 739; offered in evidence at R. 759.

in the direction of the San Francisco water front (R. 463). As the vessels approached more closely, the Maui's port side appeared to sweep down on the stem of the Absaroka (R. 286, 291). The bow of the Maui cleared the Absaroka, and a few seconds later the vessels came together, the Absaroka striking the Maui's port side while moving with slight headway (R. 285-6, 184). The collision occurred in the near vicinity of Pier E of the bridge (R. 186, 213). The place of collision was asserted by Maui witnesses to be under the center of the span between Piers D and E of the bridge. The angle of collision was 60 to 70 degrees (R. 546-7, 663).

Piland, the lighthouse keeper, was impressed by the Maui's speed. In his written report, sent in to his superior officer the day following the collision (see Appendix), he said that the vessel which turned out to be the Maui "hove into view, coming under the bridge at a good speed and collided with the outgoing ship." Noting the speed of the Maui as she continued after the collision, he further stated in his report:

> "The ships crashed together twice, the incoming ship kept her course and same rate of speed as though nothing at all had happened, just like a 'hit run driver'. * * * The incoming ship that was heading for Hunters Point was out of view before the outgoing ship had turned and headed for Pier 40 or thereabouts."[3]

In his oral testimony before the court, the lighthouse keeper, who had had experience as a seaman and navigator, testified to the Maui's speed.

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3. Maui Exhibit 13, R. 194-195. Offered in evidence, R. 195.

"The Court: What was it you said about the other vessel's speed?

A. She was going at a fast rate of speed, Your Honor." (R. 185)

He also told the court that the Maui heeled over to her right as she struck the Absaroka, which was another factor indicating great speed (R. 185, 198).

SPECIFICATION OF ASSIGNED ERROR INTENDED TO BE URGED

The error which we rely upon is that of the Circuit Court of Appeals in, while accepting the facts as to the Maui's speed, overturning the determination of the District Judge that such speed was excessive and was the cause of the collision.

SUMMARY OF ARGUMENT

The speed of the Maui was 12 knots, in the dark, in a part of San Francisco where traffic was to be expected and where vision was obscured by an island. Such a speed in a harbor has been condemned by the courts for virtually every situation except that of a vessel in the hold-on or privileged position under the Crossing Rule. There should be, and need be, no privilege in any vessel to go at a speed which, under the existing circumstances, endangers other vessels, whether the first vessel is a hold-on vessel or a burdened vessel under the Crossing Rule or a meeting vessel or an overtaken or overtaking vessel. The trial court's finding that the Maui was going at an excessive speed and that that speed contributed to the collision rested on undisputed facts and was correct in law.

ARGUMENT

The collision was brought about by the excessive speed of the Maui. As privileged vessel under the Crossing Rule, she was not privileged to go at an excessive speed.

The testimony is without contradiction that the Maui was proceeding at approximately 12 knots an hour until she commenced her asserted *extremis* maneuvers, the first of which was to increase her speed (R. 530, 704).

The Circuit Court of Appeals, reversing the trial court's finding of excessive speed, in effect held that the Maui was under no limitation as to speed (R. 852, 853) notwithstanding the fact that the Maui was proceeding in the dark in San Francisco Harbor, in a part of the bay where traffic was to be expected.

The crossing situation is the most hazardous one under the Rules of the Road.

> "According to the case books, about forty percent of faulty collisions are crossing cases. When we consider the nervous psychology nearly always present on one or both vessels in these cases, the wonder is that the collision rate is not higher. One is almost inclined to believe that the crossing situation should have a law against it."
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> Farwell, *The Rules of the Nautical Road,* p. 176.

It is manifestly of importance to seamen that the essential elements of this important rule be clearly defined. This was recognized by this Court in *Postal Steamship Corporation v. Steamship El Isleo, etc.,* 308 U.S. 378, when it passed upon the validity of Rules II and VII of the Board of Supervising Inspectors.

In the present case, the opinion of the Circuit Court of Appeals relieving the Maui from the consequences of her

excessive speed upon the assumption that she was not restricted by any rule as to her rate of speed presents an important question which has not been clarified by the Federal courts or passed upon by this Court.

The holding of the Circuit Court of Appeals that the speed of a privileged vessel is not limited by rule or law is, however, in conflict with the principles with respect to speed laid down by this Court.

> "In *The Europa,* it was said by the Privy Council:
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> 'This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible; and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour.'"
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> *The Pennsylvania v. Troop,* 19 Wall. 125, 86 U.S. 125, 22 L.ed. 148.

See also *The City of Paris,* 9 Wall. 634, 76 U.S. 634.

In *Postal Steamship Corporation v. Steamship El Isleo,* supra, this Court recently said (p. 387):

> "The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action."

Farwell, in summarizing the Crossing Rule, states:

> "In accordance with the theory of privilege and burden the crossing situation requires, both in inland waters and on the high seas, that the vessel having the other to port maintain course and speed, and that the vessel having the other to starboard keep out of the way, avoid crossing ahead, and if necessary

slacken speed or stop or reverse. This arrangement creates a serious hazard when, as frequently happens, either vessel fails to do her duty."

Farwell, The Rules of the Nautical Road, pp. 192-193.

A serious hazard is *also* created when either the privileged vessel or the burdened vessel is navigating at an excessive speed when the crossing rule comes into operation; that is, when risk of collision first occurs.

If a speed of 12 knots was a safe speed when the Maui was farther up the bay, it was certainly not a safe speed when the Absaroka came into view as the Maui approached the San Francisco-Oakland Bay Bridge. Prior to the time when risk of collision between the Maui and the Absaroka first existed, the Maui had ample opportunity to check her speed. She did not do so, as the testimony of her own officers has shown. Her navigator chose to run at 12 knots, thinking to reduce her speed *after* she got clear of bridge traffic, instead of *before* she got into or clear of it (R. 684). Reasonable prudence, of course, would have dictated that she take into account the existing circumstances and reduce her speed before coming into traffic, and not after getting out of it.

The fact that in Article 16 of the Inland Rules[4] there is an express injunction to proceed at a moderate speed in the fog is no basis for assuming that, if there is no fog, a vessel's speed need not be limited. *Farwell, The Rules of the Nautical Road,* pp. 238, 239.

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4. "Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

The requirements of reasonable speed under clear weather conditions is covered by Article 29 of the Inland Rules, known as the Good Seamanship Rule.[5] The courts have found no difficulty in holding vessels at fault for excessive speed in clear weather in many situations:

> "One of the important applications of the rule of good seamanship as interpreted by the courts is in the restriction of speed. While moderate speed in foggy weather is a very definite requirement of the rules, they are silent on the subject of speed in clear weather. It is true that in most canals and in many rivers and harbors a specific speed limit is fixed by local statute or ordinance, and such a regulation has unquestionably the force of law. When a speed regulation exists, it invariably means speed over the ground and allowance must therefore be made when the rate is accelerated by a favorable current. *However, an examination of the cases shows numerous decisions holding vessels at fault for excessive speed in inland waters in the absence of any specific speed limit, these speeds ranging all the way from 4 to 17 knots.* It may be stated as a general rule that any speed in a harbor or narrow channel is excessive (1) if it causes damage to other property by the vessel's swell, or (2) if it renders the vessel herself unmanageable in maneuvering to avoid collision." (Italics ours)
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> *Farwell, The Rules of the Nautical Road,* pp. 238, 239.

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5. "Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Under Article 29, vessels have been held at fault by the Federal courts for excessive speed in clear weather in many different types of situations. The one notable exception is that of the speed of a privileged vessel in a crossing situation. The rules are all right, but the Federal courts, such as the Ninth Circuit Court of Appeals in this case, have misinterpreted them by failing to apply Article 29 to the hold-on vessel in the crossing situation.

It is no answer to say that, if the speed of the privileged vessel is too great, her obligation to hold course and speed is qualified by Article 27,[6] which excuses a vessel from strict obedience to the rules where special circumstances intervene. Article 27, in speaking of special circumstances, does not include within its scope circumstances in the nature of self-created danger, such as that produced by the Maui. Special circumstances are exceptional situations in the nature of an emergency rendering a departure from the rules necessary,[7] not ordinary anticipated harbor conditions, which make moderate speed necessary for general safety. The applicable rule is not Article 27, but Article 29.

In the case of *The Knoxville City*, 112 F.(2d) 223, the Ninth Circuit Court of Appeals held the Knoxville City solely at fault for a collision on the harbor side of the 1800-foot gap between the Los Angeles breakwaters. Before the collision, the Knoxville City had left her anchor-

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6. "Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

7. *The Rules of the Road at Sea*, La Boyteaux, p. 168.

age and proceeded at an admitted speed of 8 knots under circumstances where her lights might be obscured from other vessels, such as the Arkansan, by vessels at anchor and by the breakwater light. That collision was also in the early morning, under clear weather conditions. The court condemned the 8-knot speed.

While the Knoxville City was the burdened vessel on a crossing course, she might have met a vessel coming in the opposite direction in harbor traffic. It is difficult to see why her speed of 8 knots would have been any less of a hazard; that is, any less likely to contribute to the collision if the latter situation had materialized, and she had been a hold-on vessel under the Crossing Rule.

Notwithstanding its decision in *The Knoxville City*, under conditions which were not unlike those in the present case, the Circuit Court of Appeals reversed the trial court's findings in the present case that the Maui was going at an excessive speed, although her speed was 12 knots. The reason for the difference in the ruling was, not because of a different finding of fact, but, as indicated in the court's opinion, because of the belief of the court that the Maui was not restricted as to her speed. There is no wisdom in a rule holding that a vessel proceeding in a harbor where she is likely to encounter traffic will be found to be traveling at an excessive speed as to vessels which cross from her starboard hand, and not at an excessive speed as to vessels which cross from her port hand. She may be at one moment a hold-on vessel and at another a burdened vessel. The propriety of her speed is not to be judged by the unpredictable accident of whether another ship will cross from the left or from the right.

There is enough danger in the crossing situation without augmenting it by giving the hold-on vessel a privilege as to the rate of her speed. It seems hardly necessary to point out the reasons which should impel the privileged vessel to run at all times at a reasonable speed. In every other situation, on land and at sea, the connection between fast speed and a casualty has found clear recognition by the courts.

If a privileged vessel, proceeding in frequented parts of a harbor, is going at a safe speed, a burdened vessel which comes into view has more time and opportunity to get out of the way. When, as was the case with the Absaroka and Maui, the collision is at night, when the vessels can see each other only by their lights and it is difficult to judge distances, if the speed of the hold-on vessel is moderate, there is more time to watch the bearing of the lights and to determine the question as to whether the bearing is changing,[8] and additional time is afforded to the burdened vessel to take any maneuvers which may be required. If there are more than two vessels involved in the situation, as was the case here, because of the presence of the tug Despatch and her tow, this additional time may be vital.

The Absaroka was in a difficult predicament. Before sighting the Maui, she had exchanged whistles with the tug Despatch calling for a starboard-to-starboard passage.

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8. This is a means of determining whether risk of collision continues to exist.

Note to Article 17, Inland Rules (33 U.S.C. 201): "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

She therefore could not change her course to the right without running the risk of striking the tug and tow. She could in no event make a decided swing to the right because of the presence of Yerba Buena Island close on her starboard hand. There was no way in which the Absaroka could determine whether the Maui would first pass ahead of her to her left, or whether the tug would first pass on her right, as these approaching vessels could be seen only as lights ahead of her. The Absaroka had the right to assume that the Maui was proceeding at a safe speed. She also had the right to assume that the Maui and the tug Despatch had agreed upon a passage between them as required by the Overtaking Rule.[9] If such a passage was not safe, it was the obligation of the tug to refuse consent to the passage by blowing a danger whistle. The testimony is uncontradicted that the tug never agreed to the Maui's overtaking maneuver.

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9. Article 18, Rule VIII, 33 U.S.C. Sec. 203, Subd. VIII, which provides:

> "When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals."

In these circumstances, the Absaroka had the right to anticipate that she could pass the Maui and the tug one at a time. She therefore slowed down and waited. The fact that she was not seen promptly to turn to her right alarmed the master of the Maui and he, some 2¼ minutes before the collision, not yet clear of the tug and tow, commenced his *extremis* maneuvers.

Under these admitted conditions, the collision was brought about. It is evident that had the Maui been proceeding at a reasonable speed, there would have been ample time and opportunity to avoid the collision. Coming into view of the Absaroka at a speed of 12 knots, with the obstacle of overtaking and getting clear of the tug and tow before she got to the bridge, the Maui was in a predicament. Had she been going at a safe speed, it would have been easy for her to turn under the stern of the tug and tow or to hold back until she could see what the Absaroka was able to do. Instead, when approximately one-third of a nautical mile from the Absaroka, she undertook the asserted *extremis* maneuvers, which brought about the collision. The departure from her course at that distance was the result, not of the Absaroka's inaction, but of the Maui's own excessive speed.

A navigator with a liking for speed, such as the master of the Maui, will find comfort and assurance in a decision that he can, with impunity, go at a rapid rate down through the San Francisco Bridge, knowing that any traffic which comes out from behind the Island, from Oakland or Alameda, will be caught in the position of burdened vessels and obliged, at their peril, to keep out of the way.

CONCLUSION

Maintaining course and speed under the injunction of Article 21, when the speed is excessive, is not adherence to the Rules of the Road. Article 29 requires that at the time Article 21 comes into operation, the vessel in the hold-on or privileged position be proceeding at a moderate or reasonable speed in view of the existing conditions and the traffic to be anticipated. Whenever a steamer proceeds into waters where the frequent passing of vessels may be expected or where known difficulties render a high rate of speed dangerous, prudence requires her to go at a rate commensurate with the attending dangers. The Maui did not do so, but relied upon an assumed privilege as to her rate of speed, in which she was supported by the Circuit Court of Appeals.

Respectfully submitted,

IRA S. LILLICK,
JOSEPH J. GEARY,
Proctors for Petitioner,
Pope & Talbot, Inc.

(APPENDIX FOLLOWS)